

HEPATITIS C OPTIONS

Options for haemophiliacs infected with hepatitis C through blood products in the wake of the Consumer Protection Act Judgement of 26 march 2001

Issue:

The recent judgement made under the CPA found in favour of paying no fault compensation to 117 claimants infected by the Hep C virus through blood transfusion. This runs counter to the Government's stance that, *as a general rule*, no fault compensation should not be paid to patients inadvertently harmed by NHS treatment.

The Government has made very few exceptions and these have been only where the circumstances have been truly exceptional and any resulting consequences very severe, e.g. in the cases of HIV/AIDS and vCJD.

As the judgement has not been appealed, compensation must now be paid to the 117 claimants whether or not their circumstances are exceptional. It is important to note that in 80% of cases infected with Hep C, no serious illness ensues and these cases could not be viewed as exceptional. Nevertheless, around 120 have already died of Hep C from infected blood and others are terminally ill. For these people, there are close parallels with HIV/AIDS and vCJD cases.

The Haemophilia Society cites the case of three haemophiliac brothers, all of whom were infected by a virus for which the vector was the blood product Factor VIII. Two brothers died from HIV/AIDS and the third from Hep C. The families of two brothers are supported through the HIV/AIDS scheme, the other family receives nothing.

The Judgement raises four challenges for government:

- i. to take back the initiative on the question of no fault compensation
- ii. to arrive at the optimum equitable outcome for all patients who have received Hep C infected blood or blood products
- iii. to address the renewed lobbying campaign by MPs and the Haemophilia Society prompted by the Judgement
- iv. to quantify and contain the potential the impact on the NHS

The last of these will be the subject of a separate paper.

If Ministers wish to pursue options ii – v, detailed costs would need to be calculated.

Option 1

Compliance with the letter of the CPA Judgement and the legal precedents that it sets (the “do nothing” option).	
For: Discharges legal obligation under CPA Will meet needs of some seriously ill patients	Against: Initial cost of £7.5m; more as disease progresses Unquantified further cost for cases where Judgement sets a legal precedent Does not satisfy lobby; likely to further intensify campaign Makes payments to people who may not be ill and have suffered little harm May not address needs of the seriously ill, dead or dying Leaves opening for negligence cases Imposes terms of a no fault compensation scheme on Government unchallenged Danger of setting a precedent for wider non negligent harm cases Unwelcome emotive publicity ongoing “scandal” with each death

This option represents the legal minimum response that the Government can make to the Judgement.

Option 2

Public Inquiry, lump sum and hardship fund for all haemophiliacs infected with Hep C by blood

For:	Against:
Discharges legal obligation under CPA	CPA Costs as at Option 1
Would satisfy lobby	Prohibitive initial cost and additional costs later (Lump sum for haemophiliacs and widows alone estimated at £200m)
Would establish all the facts	Relevant facts largely established; information in the public domain
	Sets no parameters for compensation – <i>all</i> infected receive it, whether people are ill or have suffered harm
	Sets new (untenable) precedent for no fault compensation payments
	Lengthy time period for Inquiry to report
	Public Inquiry would raise the profile of potential no fault compensation at a time when litigation in the NHS is an increasing problem.

Delaying any consideration of compensation until after a full Public Inquiry would share the disadvantages above. (Payment to CPA Judgement cases could not be delayed.) In addition, it would not satisfy the lobby who want to see immediate action.

Option 3

Lump sum and hardship fund for all haemophiliacs infected with Hep C by blood and low key Inquiry	
For: Discharges legal obligation under CPA Would satisfy lobby to some degree Lower initial costs for Inquiry Shorter time period	Against: CPA Costs as at Option 1 Expensive; lump sum for haemophiliacs and widows alone estimated at £200m Relevant facts largely established; information in the public domain Sets no parameters for compensation – <i>all</i> infected, whether people are ill or have suffered harm Sets new (untenable) precedent for no fault compensation payments Inquiry report would raise the profile of potential no fault compensation when litigation in the NHS is an increasing problem.

Option 4

Lump sum and hardship fund for all or some haemophiliacs infected with Hep C by blood	
For: Discharges legal obligation under CPA Might to satisfy lobby Could address the needs of the dead or dying; hardship fund targets cash where it's needed Lessens incentive to bring cases in negligence	Against: CPA Costs as at Option 1 Expensive; lump sum for haemophiliacs and widows alone estimated at £200m Lump sum sets no parameters for compensation – <i>all</i> infected, whether people are ill or have suffered harm Lump sum sets new (untenable) precedent for no fault compensation payments

Lobby unlikely to press for an Inquiry if their compensation demands are met. However, a small lump sum, aimed at all infected haemophiliacs, including those who are asymptomatic, might be taken as an insult to the seriously ill. Targeted lump sums would need a range up to perhaps £75k and require individual assessments. This would increase administrative costs considerably without resolving the problem of setting a precedent by making across-the-board “no fault” payments.

Option 5

Hardship fund for haemophiliacs infected with Hep C by blood and who have severe liver disease	
For:	Against:
Discharges legal obligation under CPA	CPA Costs as at Option 1
Could satisfy lobby if properly presented	Lobby might find this hard to swallow
Would address the needs of the dead or dying	Long term commitment; at least ten years and longer if families are included.
Modest initial outlay ; around £2m pa + administration of around £100,000 pa.	
Lessens incentive to bring cases in negligence	
Puts Government back in control over terms of no fault compensation	
Reasserts Government position that ex gratia payments are only made in exceptional circumstances in the NHS	
Prevents CPA Judgement becoming the norm/going unchallenged on no fault compensation	

In addition, this option allows Government to recover the high moral ground; that is that they take care of the exceptionally tragic cases, regardless of the vagaries introduced other arbitrary influences like the CPA Judgement. This is an easier line to hold than continuing to exclude those dead and dying from Hep C infection in blood. The MacFarlane Trust already administers the hardship fund for HIV/AIDS cases and has indicated its willingness to extend its remit. (The Eileen Trust would need to be approached if Ministers wished to include non haemophiliacs).